RESPONSE REQUESTED

ORIGINAL

NO. 90-5672

Supreme Court, U.S.
FILED
NOV 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICK BRESSMAN, No. 89-1186

Petitioner,

v.

HAL FARRIER, PAUL GROSSHEIM, CALVIN AUGER, JOHN SISSEL, PAUL GRETTEN, J. MANTERNACH, LARRY BRIMEYER, and MR. BUTCHER,

Respondents.

GEORGE GOFF, No. 89-1187

Respondent,

v.

CRISPUS NIX, HAROLD FARRIER, DEPUTY WARDEN HENRY, CO SPANGLER, CO ROONEY, CO MARSHALL, CO SEVERIN, CO DRUMMOND, CO STEVENS, CO FIELDS, CO DILKS,

Petitioners.

LAURENCE BURGIN, BIE

Respondent,

v.

HAL FARRIER, PAUL GROSSHEIM, CRISPUS NIX, RON WELDER, CHARLES HARPER, MARION WARE, JOHN SANDERS, RANDALL MARTIN, R.W. McVEIGH, JOHN LEWIS, A.K. ANDERSON, RICHARD McALLON, NEAL BREDING, CAPTAIN BRIDLE, J.R. GOETZ, GERALD DOLF, GEORGE FINN, LT. MITCHELL, PAUL SCHROCK, JOHN DEWEY, RICHARD LARKIN, GEORGE CLYMAX, RICK BARLOW, DONNELL PROUGH, LT. BIRDSELL, STEVE YOUND, KEVIN SELTON, LT. BARNARD, LT. CORWELL, JAMES RENNES, RAY OLSON, PAT McLAUGHLIN, BOB WASHINGTON,

Petitioners.

RECEIVED
NOV 19 1990
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

RONALD W. BREWER,

Respondent,

v.

JOHN HENRY, SARAH COATS, JAMES BURTON,

Petitioners.

CHARLES O. REESE,

Respondent,

v.

HAL FARRIER, CRISPUS NIX, PAUL HEDGEPETH,
JOHN HENRY, RON WELDER, CHARLES HARPER,

Petitioners.

CHESTER WALTON, JR.,

Respondent,

v.

CRISPUS NIX, CHARLES HARPER,
LT. SHIP, RONALD WELDER,

Petitioners.

AFFIDAVIT OF MAILING

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI

I, Gordon E. Allen, a member of the Bar of this Court, being first duly sworn upon oath, depose and state that on the 16th day of November, 1990, I mailed an envelope addressed to the Clerk of the Supreme Court of the United States, One First Street, N.E. Washington, D.C. 20543, first-class postage prepaid, containing the original and twelve ( ) copies of Respondent's sistance to Petition for Writ of Certiorari in the above entitled case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon E. Allen, a member of the Bar of this Court, hereby certify that on the 16th day of November, 1990, one copy of Respondent's Resistance to Petition for Writ of Certiorari was mailed first-class postage prepaid, to Philip B. Mears, MEARS, ZIMMERMANN & MEARS, 209 East Washington Street, Paul-Helen Building, Suite 230, Iowa City, Iowa 52240, counsel of record for petitioners herein. I further

certify at all parties required to be served have been served.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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STATEMENT OF THE CASE

The State of Iowa adopts Petitioner's statement of the case.

SUMMARY OF ARGUMENT

The Petitioner seeks a writ of certiorari be issued to review two claims. First, whether the Federal courts have jurisdiction to entertain claims under 42 U.S.C. § 1983 challenging prison discipline if the prisoner is not seeking restoration of good time credits as part of requested relief. Second, whether the prisoner challenging prison discipline should have his claim in Federal court dismissed if a state procedural default prevents him from litigating his claim in the state court on the merits.

The Eighth Circuit has not closed the Federal courthouse door to prisoners seeking remedy for violation of their constitutional rights in disciplinary proceedings. More importantly, the Eighth Circuit opinion in this case does not differ from the many other decisions which have construed Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed.2d 935 (1974); Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). While the language and nomenclature may differ, there is no conflict among the circuits. It is the result which remains consistent.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Decision in the Circuit Court Has Not Closed the Door to the Federal Courthouse And Is Not Inconsistent With Current Federal Law.

The Eighth Circuit decision in this case and in prior decisions in Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) and Jones v. Smith, 835 F.2d 175, (8th Cir. 1987) do not close the door to inmates seeking Federal court review of their prison disciplinary hearings and loss of good time. Petitioners assert that a state decision on the merits may preclude the inmate from relitigating in Federal court. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Prisoners should be bound by the same rules as other litigants. The doctrines of res judicata and issue preclusion were not developed in order to keep prisoners out of Federal court. The same principles allow a prisoner who wins in state court to return to Federal court having exhausted his remedies and utilize the doctrine of issue preclusion in a damage action.

Plaintiff suggests that the Iowa courts are not available to prisoners as there are procedural hurdles including a lack of jurisdiction where a person has not taken internal administrative appeals [Aschan v. State, 446 N.W.2d 791 (Iowa 1989)], and procedural default where a person has not raised particular constitutional claim on administrative appeals. [Bonds v. State, 447 N.W.2d 135

(Iowa 1989)]. These are not "insurmountable hurdles" as petitioner suggests. They are easily met in literally hundreds of cases each month. Petitioners' suggestion that the Iowa Legislature has recently eliminated review by the Supreme Court is not wholly accurate. The Iowa Supreme Court now reviews the district court decisions on petition for writ of certiorari, rather than appeal. 1990 Iowa Acts, 73rd G.A., Ch. 1043 § 1. Neither is this requirement a barrier to Federal court access.

The Eighth Circuit Decision in This Case Is Not Inconsistent With Supreme Court Precedent Nor Does it Conflict With Decisions in Other Circuits Which Have Interpreted That Precedent.

There has been much discussion in the circuits about the interplay between Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) and Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed.2d 935 (1974). There is no disagreement that Preiser v. Rodriguez holds that an inmate who attacks the length of confinement and is seeking restoration of good time credits, must utilize a petition for habeas corpus pursuant to 28 U.S.C. § 2254 and must exhaust state remedies. The dialogue in the circuits has been generated by the language in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct 2963, 41 L.Ed.2d 935 (1974) which discusses the requests for declaratory relief and damages.

The Court found that Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good time credits is sought in state proceedings, and that a declaratory judgment as a predicate to a damage award would not be barred by Preiser. The Court then found that only an injunction restoring good time improperly taken is foreclosed. Wolff, 418 U.S. at 554-554.

As the court in Preiser indicated, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983. 411 U.S. at 490, 93 S.Ct. at 1836, 36 L.Ed.2d at 450. The court held that

> Since the internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of those problems. . . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the states the first opportunity to correct the errors made in the internal administration of their prisons.

Id., at 492, 93 S.Ct. at 183, 36 L.Ed.2d at 452. Thus the court in Preiser clearly made habeas corpus the exclusive remedy to seek the restoration of good time lost as a result of prison disciplinary hearings.

The Eighth Circuit formulated a rule in Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987) that was based upon this ruling.

> Because a prisoner wins a § 1983 action in Federal court for damages or declaratory relief for the unconstitutional deprivation of good time credits thereby establishing an irrefutable claim for early or immediate release under habeas, we hold that in such a case the Federal court should stay the § 1983 claim until the plaintiff has satisfied the exhaustion requirement with respect to the underlying constitutional issue.

823 F.2d at 1258. This is the rule followed in the cases before the court. It does not conflict with Preiser and Wolff.

Wolff was a class challenge to a system of discipline. Wolff upheld the circuit decision to treat requests for restoration of good time as habeas. 418 U.S. at 554. What went forward was not a challenge to individual discipline but a challenge to the system. See, Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112 (5th Cir. 1987); Alexander v. Ware, 714 F.2d 416 (5th Cir. 1983).

Bressman presents a challenge to individual decisions not a class challenge to a disciplinary system. Wolff said

> Preiser expressly contemplated that claims properly brought under § 1983 would go forward while actual restoration of good time credits is sought in state proceedings. [citing Preiser v. Rodriguez, 411 U.S. at 499 n.14]

Wolff, 418 U.S. at 554.

Beyond the class challenge to the system in Wolff, the court did not elaborate on what kinds of cases were properly brought under § 1983. Obviously, under Preiser, the cases "not properly brought under § 1983" if the exclusive remedy is habeas. The threshold determination is the nature of the claim and the effect of the Federal court remedy.

Courts which have examined Preiser and Wolff have differed in the terminology used to determine whether the case was properly habeas corpus or civil rights, but the results are uniform in their analysis. Some have looked at whether the court looks at the core of the complaint or the effect of a Federal judgment. Mack v. Varelas, 835 F.2d 995 (2nd Cir. 1987); Williams v. Ward, 556 F.2d 1143 (2nd Cir. 1987); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); Hadley v. Warner, 753 F.2d 514 (6th Cir. 1985); Hansen v. Heckel, 791 F.2d 93 (7th Cir. 1986); Crump v. Lane, 807 F.2d 1394 (7th Cir. 1986); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); Jones v. Smith, 835 F.2d 175 (8th Cir. 1987); Young v.Kenny, 887 F.2d 237 (9th Cir. 1989); Ybarra v. Rhino Thunderbird Mobile Home Village, 723 F.2d 675 (9th Cir. 1984); Parkhurst v. State of Wyoming, 641 F.2d 775 (10th Cir. 1981); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989). Some have framed their analysis in terms of single hearing versus systems challenge. Alexander v. Ware, 714 F.2d 416 (5th Cir. 1983) (challenge to a single allegedly defective hearing must be viewed as habeas regardless of the nature of

the relief sought while broad due process challenges to a disciplinary system present challenges to conditions of confinement). Cf. Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112 (5th Cir. 1987) (challenge to a single parole board hearing must be exhausted through habeas corpus but even broad based claims which might entitle one or more claimants to immediate or early release must also be exhausted). One has used a "manner versus outcome" approach. Georgevich v. Strauss, 772 F.2d 1078 (3rd Cir. 1985) (class action challenge to parole procedures proper under 1983 where challenge is to the manner by which prison authorities reached decision not the outcome of their decision). The common thread however is that cases which involve conditions of confinement are not subject to the exhaustion requirement while claims which affect the fact and duration of confinement must follow habeas. See Preiser v. Rodriguez, 911 U.S. at 499-500 n.14, 93 S.Ct. at 1827 n.14, 36 L.Ed.2d n.14. The Eighth Circuit in Bressman did not require exhaustion of claims which did not involve the deprivation of good time credits. This is consistent with decisions from other circuits. Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983) ($ 1983 action will lie if the prisoner has already been released from custody); Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989) (equal protection claim will not lessen the duration of his sentence).

Only one panel has made a decision that the relief requested in the complaint determines whether a claim must be exhausted pursuant to the habeas corpus statute. Viens v. Daniels, 871 F.2d 1328 (7th Cir. 1989); cf. Hansen v. Heckel, 791 F.2d 93 (7th Cir. 1986) and Crump v. Lane, 807 F.2d 1394 (7th Cir. 1986). One panel of the Eleventh Circuit has criticized prior decisions of the Fifth and Eleventh Circuits which found that the mere assertion of damages rather than release was insufficient to distinguish a civil rights case from a habeas corpus case. Gwin v. Snow, 870 F.2d 616 (11th Cir. 1989). The court in Gwin, however, held that even under prior authorities the plaintiff did not need to exhaust his claim as the effect of a Federal court judgment would not lessen the duration of his sentence. Finally, in Monk v. Secretary of the Navy, 793 F.2d 364 (D.C. Cir. 1986). The Circuit found a distinction between a challenge which would affect the underlying conviction as opposed to a challenge to an administrative action unrelated to his conviction. That court held that because the claim affected the underlying conviction, state remedies must be exhausted pursuant to habeas corpus. Only in this analysis arguably conflicts with the holding in Preiser and he Eighth Cirucut here that habeas corpus would be the exclusive remedy for attacks on the fact or length of confinement, regardless of whether a claim arose as a result

of a criminal conviction or as a result of extension of sentence because of the adjustment of good time credits.

The appellate courts have on many occasions considered "the ambiguous borderline between habeas corpus and § 1983." Offet v. Solem, 823 F.2d at 1256. The results however are fairly predictable in spite of the differences in analysis and no real conflict in the circuits is apparent.

Certiorari Should Not Be Issued to Review Whether a Prisoner Challenging Prison Discipline Should Have His Claim in Federal Court Dismissed If a Procedural Default Prevented Him From Litigating in the State Court on the Merits.

Petitioner argues that the holding in the Bressman case imposes a complete exhaustion requirement on prisoners contrary to established United States Supreme Court precedent in Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2257, 73 L.Ed.2d 172 (1982). Bressman is reconciled with Patsy in that only those claims which result in direct or indirect challenge to the fact or duration of confinement must be characterized as habeas corpus claims. Once that decision is made based on the nature of the case, there is no choice; habeas is the exclusive remedy and the claim is not "properly brought under § 1983". Preiser, 411 U.S. at 499 n.14, 36 L.Ed.2d at 439 cited in Wolff, 418 U.S. at 554, 41 L.Ed.2d at 950.

Once exhaustion is required, it is obvious that the court must have a doctrine which prevents an inmate from deliberately avoiding state remedies in order to litigate

the claim in Federal court. See, Fay v. Noia, 372 U.S. 391, 433, 82 S.Ct. 822, 846, 9 L.Ed.2d 837 (1963). Once the determination is made that a case should proceed through habeas corpus, it is not surprising that the court would use habeas corpus analysis to determine if a petitioner had a legitimate reason for by-passing state procedures. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 rhg. denied 434 U.S. 880, 98 S.Ct. 241, 54 L.Ed.163 (1977).

CONCLUSION

Petitioner has not met the requirements of the Supreme Court Rule 10. In the 16 years since Preiser and Wolff, the appellate courts have fairly consistently applied Preiser and Wolff to preserve a Federal forum for those claims which challenge the conditions of confinement or requiring those claims which affect the fact or duration of confinement to follow habeas corpus procedures. Bressman merely emphasizes that challenge to prison discipline where good time credits are lost are habeas corpus claims and those doctrines regarding exhaustion of remedies will be applicable.

Respectfully submitted,

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